

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

ANTHONY SCALES,

Plaintiff,

v.

CIVIL ACTION No.: 2:18-cv-00372
Mingo County Circuit Court
Civil Action No. 17-C-139

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

NOTICE OF REMOVAL

Comes now, Defendant Norfolk Southern Railway Company (“NSRC”), pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446, and hereby gives notice of the removal of the case styled as “*Anthony Scales v. Norfolk Southern Railway Company*,” Civil Action No. 17-C-139, pending in the Circuit Court of Mingo County, West Virginia, to the United States District Court for the Southern District of West Virginia at Charleston.

NSRC is filing this Notice of Removal pursuant to 28 U.S.C. §§ 1446(b)(3) and 1446(c)(1) on the basis that the case became removable on February 26, 2018, when the Circuit Court of Mingo County entered former Co-Defendant’s proposed Order voluntarily dismissing the only remaining non-diverse defendant in this case, Rodney Jerome Joplin. As grounds for the removal of this action to this Court, Defendant states as follows:

A. Factual and Procedural Background

1. Plaintiff instituted this civil action in the Circuit Court of Mingo County, West Virginia against Defendant on or about August 16, 2017.

2. Plaintiff asserts a claim of negligence arising from injuries he allegedly sustained in a motor vehicle accident that occurred along County Route 49 in Mingo County, West Virginia involving an NSRC owned vehicle. See Summons and Complaint, attached as **Exhibit A**. Plaintiff's Complaint alleged negligence claims against both NSRC and Rodney Jerome Joplin. See **Exhibit A**.

3. Defendant NSRC was served with a copy of the Summons and Complaint, via the West Virginia Secretary of State, on or about August 22, 2017.

4. On approximately September 21, 2017, former Co-Defendant Rodney Jerome Joplin filed an answer to Plaintiff's Complaint along with a Cross-Claim against NSRC. See Co-Defendant Joplin's Answer and Cross-Claim, attached as **Exhibit B**.

5. On or about September 21, 2017, Defendant NSRC answered Plaintiff's Complaint and Co-Defendant Joplin's Cross-Claim and filed a reciprocal Cross-Claim against Co-Defendant Joplin. See NSRC's Answer to Complaint and Cross-Claim, attached as **Exhibit C**.

6. On October 9, 2017, NSRC sent interrogatories and requests for production to Plaintiff and former Co-Defendant Rodney Jerome Joplin. See NSRC Discovery Requests, attached as **Exhibit D**.

7. On or about October 13, 2017, former Co-Defendant, Rodney Jerome Joplin filed his answer to NSRC's Cross-Claim. See Co-Defendant Joplin's Answer to Cross-Claim, attached as **Exhibit E**.

8. On November 22, 2017, former Co-Defendant, Rodney Jerome Joplin filed a motion with the Mingo County Circuit Court seeking a declaration that his settlement with Plaintiff was in good-faith and for a dismissal of NSRC's Cross-Claim. See Co-Defendant

Joplin's Motion for Declaration, attached as *Exhibit F*. NSRC responded in opposition to the Motion in order to retain Rodney Jerome Joplin in the case as a Co-Defendant. See NSRC's Response, attached as *Exhibit G*.

9. On or about December 1, 2017, Plaintiff responded to NSRC's discovery requests. One of NSRC's interrogatories requested Plaintiff to describe "in detail, all elements of damages which [Plaintiff] claim[s] in this matter". See Plaintiff's Answers to Interrogatories, attached as *Exhibit H*, at ¶27. Plaintiff responded with a total damage claim of \$143,305.28. *Id.*

10. On January 22, 2018, the Court heard argument from all parties regarding former Co-Defendant Rodney Jerome Joplin's Motion for Declaration of good faith settlement and dismissal of NSRC's cross-claims. Judge Darrell Pratt sitting as the assigned Judge granted Rodney Jerome Joplin's motion. The order dismissing Mr. Joplin from the action was subsequently entered on February 26, 2018. See Order dated February 26, 2018, attached as *Exhibit I*. The entry of this order leaves NSRC as the sole remaining Defendant in this case.

B. Removal of this matter is proper pursuant to 28 U.S.C. §§ 1332, 1441, and 1446

11. In accordance with 28 U.S.C. § 1446(a), a copy of the Summons and Complaint served on NSRC is attached hereto as *Exhibit A*. A copy of the Mingo County, West Virginia docket sheet is attached as *Exhibit J*.

12. Venue for this removal is proper under 28 U.S.C. § 1441(a) because this Court is the United States District Court for the district and division corresponding to the place in which the state court action was pending.

13. This is a civil action that falls under this Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and is one that may be removed to this Court based on diversity of citizenship under 28 U.S.C. §§ 1441 and 1446.

14. This Court now has original jurisdiction pursuant to 28 U.S.C. §1332 because once the Circuit Court dismissed former Co-Defendant Rodney Jerome Joplin from the action, there exists complete diversity of citizenship between Plaintiff and the remaining Defendant, NSRC, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

Exhibit I.

15. Defendant NSRC is a Virginia corporation having its principal place of business in Norfolk, Virginia. As such, for purposes of diversity jurisdiction, NSRC is a citizen of Virginia.

16. Plaintiff, Anthony Scales, is a citizen and resident of the State of West Virginia. *See Exhibit A* at ¶1.

17. Plaintiff is a citizen of West Virginia while NSRC, the remaining defendant, is a Virginia corporation with its principal place of business in Virginia. Once Rodney Jerome Joplin, the only Defendant who was a citizen and resident of West Virginia, was dismissed, complete diversity now exists between the remaining parties.

18. For purposes of removal, the amount in controversy is determined by considering the judgment that could be entered if the Plaintiff prevailed on the merits of his case as it stands at the time of removal. Based upon the allegations contained in the Complaint and the amount of damages claimed in Plaintiff's interrogatory answers, the amount in controversy in this case clearly exceeds the sum of \$ 75,000.00, exclusive of interest and costs. *See Exhibit A; Exhibit H*, at ¶27.

19. Removal of this case on the basis of diversity of citizenship is not precluded by the provisions of Section 1441(b) of Title 28 of the United States Code because the remaining

Defendant is not a citizen of the State of West Virginia, the State in which this action was brought.

20. The Notice of Removal is timely under Section 1446(b) of Title 28 of the United States Code, as this Notice of Removal is filed within thirty (30) days after receipt by Defendant of the Circuit Court Order dismissing the only non-diverse defendant and within one year of the commencement of the action.

21. Pursuant to 28 U.S.C. § 1446(d), contemporaneously with the filing of this Notice of Removal, a copy of this Notice will be filed with the Clerk of the Circuit Court of Mingo County, West Virginia, and served upon Plaintiff's counsel.¹

WHEREFORE, this action is hereby removed from the Circuit Court of Mingo County, West Virginia, to the United States District Court for the Southern District of West Virginia at Charleston, pursuant to applicable sections of the United States Code. Please take notice that no further proceedings may be had in the Circuit Court of Mingo County, West Virginia.

NORFOLK SOUTHERN RAILWAY COMPANY

By: /s/ Angela W. Konrad
Of Counsel

Angela W. Konrad, Esquire (WV Bar #5256)
Tyler J. Wicker, Esquire (WV Bar #13059)
DINSMORE & SHOHL, LLP
611 Third Avenue
Huntington, West Virginia 25701
(304) 529-6181 (Telephone)
(304) 529-4312 (Facsimile)
Counsel for Defendant,
NORFOLK SOUTHERN RAILWAY COMPANY

¹ The dismissed Defendant was a citizen of West Virginia.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "*Notice of Removal*" was this day forwarded by United States mail, postage prepaid, this 28th day of February 2018, to:

Gregory K. Smith, Esq. (WV Bar #7229)
Law Office of Greg K Smith
132 East Second Ave.
P.O. Box 1037
Williamson, WV 25661

/s/ Angela W. Konrad
Angela W. Konrad